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Appendix A

United States Court of Appeals,
Seventh Circuit.

In re United States of America.
Case No. 10-2766

Submitted July 26, 2010.
Decided July 27, 2010.
Opinion July 30, 2010.

Before POSNER, ROVNER, and SYKES, Circuit Judges.

POSNER, Circuit Judge.

On July 27, in response to the government's renewed petition for a writ of mandamus, we issued an order granting the petition and directing the district court to admit into evidence in *United States v. Herrera*, the criminal trial of Clacy Watson Herrera on drug charges, an exhibit labeled "Roberson Seizure 2"; to allow the government to recall Stephen Koop to testify at trial about the recovery of latent fingerprints from that exhibit; and to allow testimony regarding comparison of the latent prints with known fingerprints of the defendant. The judge had excluded the exhibit and related testimony because he suspected the government, on the most tenuous of grounds, of having tampered with the evidence, and he threatened to grant a mistrial that would bar any further prosecution of the defendant by virtue of the constitutional prohibition against placing a person in double jeopardy.

Our order further stated: "The case shall be reassigned to a district judge who is immediately available to preside, and the trial shall resume as soon as possible." (The trial had begun on July 6 and had been interrupted for several days because of the judge's rulings that gave rise to two petitions for mandamus filed by the government.) We were troubled to learn that a replacement judge was not designated until the afternoon of July 29, owing to an unaccountable delay in appointing an acting chief judge to substitute for Chief Judge Holderman (the district judge presiding in this case whom we ordered recused) in arranging for the reassignment.

In a supplemental order issued on the 28th, we noted that Fed. R. Crim. P. 25(a) provides that in a case in which "death, sickness, or other disability" prevents the trial judge from continuing to preside at a trial, the judge who replaces him must certify his familiarity with the trial record before proceeding. "The term `other disability' in Rule 25(a) includes disability by reason of recusal." *United States v. Sartori*, 730 F.2d 973, 967 (4th Cir. 1984). And so our supplemental order directed the new judge, before proceeding with the trial, to certify his or her familiarity with the record.

We said in our order of the 27th that we would issue an opinion explaining it. This is that opinion; in it we also deny the defendant's petition to rehear our order.

The petition for mandamus had been filed just one day before we issued our order (which is why we

were unable, for lack of time, to issue a statement of reasons). We ruled in unavoidable haste because in apparent response to the government's petition the defendant had moved the district judge to declare a mistrial—and the judge had already stated in open court that if he granted a mistrial it would have double-jeopardy effect on the entire case even though, he said, the exhibit "relates to one count, Count No. 35, the very last count.... What will remain are 14 counts...of which multiple witnesses have testified about the defendant's involvement. And if we grant a mistrial, if a mistrial is granted, every one of those counts potentially could be dismissed from the standpoint that double jeopardy will attach to each and every one of those additional counts." And he invited the jurors to provoke a mistrial by telling them: "I certainly would understand if you are not available, you have served your term, and more than your term, as jurors"—a remark that precipitated notes from several jurors expressing concern about continuing to serve.

The judge had accused the government of lying and other misconduct and of not wanting the jury to decide the case. The second accusation is difficult to understand. Double jeopardy would bar a retrial if the government had procured the mistrial because of its dissatisfaction with the jury, even if the motion for a mistrial was made by the defendant, as it was. *Oregon v. Kennedy*, 456 U.S. 667, 673-76 (1982) (goading the defendant into moving for a mistrial); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (same); *United States v. Warren*, 593 F.3d 540, 545 (7th Cir. 2010) (same). Yet he told the prosecutors: "I find the government's conduct in seeking to preclude

this jury from making a determination with regard to the other counts, if I determine that Government Exhibit Roberson Seizure 2 is not admissible, I find that to be an intentional, purposeful statement that you don't want a determination by the jury in this case.... [W]hat the government wants is to have this jury not decide this case."

To prevent double jeopardy because of a trial judge's ruling that is so patently unsound as to exceed the legitimate bounds of judicial power is a legitimate role for mandamus when other mechanisms of review are unavailable, *United States v. Vinyard*, 539 F.3d 589 (7th Cir. 2008); *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005); *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994); *United States v. United States District Court*, 858 F.2d 534, 537 (9th Cir. 1988); see generally *In re Rhone-Poulenc Rorer, Inc.*,, 51 F.3d 1293, 1295 (7th Cir. 1995). We regret to say that the judge's ruling in this case can only be characterized thus. We note that this judge was mandamused in *In re United States*, 398 F.3d 615 (7th Cir. 2005) (per curiam), when he became wrathful toward federal prosecutors in another criminal case.

The defendant responded to our order of the 27th seemingly within minutes by filing a petition for rehearing (we accepted his amended petition for filing the next day). In it he argued that our ordering mandamus was improper because we had given neither him nor the judge a chance to respond to the petition, as required (he claims) by Fed. R. App. P. 21(b). Confusingly, this subsection of the rule refers to a response by the "respondent," and the

respondent in a petition to mandamus is the judge. But Rule 21(a)(1) and the Committee Notes to the 1996 Amendments to Rule 21 make clear that "respondent" in (b)(1) refers just to parties, not to the judge. Indeed the judge may not respond to the petition unless invited or ordered to by the court of appeals, Fed. R. App. P. 21(b)(4), and not wanting to delay the resumption of the trial we had not ordered or invited him to reply.

And because there was no time for us to order and await a response from either the defendant or the judge before granting the petition, the absence of such an order did not preclude our granting the petition for mandamus. Rule 2 of the appellate rules authorizes a court of appeals on its own initiative to suspend any of those rules that are not jurisdictional if necessary "to expedite its decision or for other good cause." See *Alva v. Teen Help*, 469 F.3d 946, 956 n. 17 (10th Cir. 2006); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999). Good cause there was. But now, in deciding to deny the defendant's motion to rehear our order, we have treated the defendant's motions, the judge's request to file a response (which we had not received before we granted the petition for mandamus), along with the transcript of the district judge's pertinent remarks in court, as responses, pursuant to Fed. R. App. P. 21(b), to the petition for mandamus.

The defendant points out that 18 U.S.C. § 3731, which governs appeals by the United States in criminal cases, does not authorize an appeal from an order excluding evidence if the order was issued after the jury is sworn. *Crist v. Bretz*, 437 U.S. 28, 35

(1978); *United States v. Salahuddin*, 509 F.3d 858, 862-63 and n. 9 (7th Cir. 2007); *United States v. Centracchio*, 236 F.3d 812, 813-14 (7th Cir. 2001); *United States v. Brooks*, 145 F.3d 446, 453 n. 2 (1st Cir. 1998). But the government has not appealed from the order; it has sought mandamus, which is typically directed against nonappealable orders, as otherwise an appeal would do. "There is no need to issue a writ of *mandamus* if the normal procedures for error correction would suffice." *United States v. Vinyard, supra*, 539 F.3d at 591. They would not in this case; were the defendant to be acquitted because of the exclusion of the fingerprint evidence, double jeopardy would bar any further prosecution of him. The judge said that the evidence related to only one count of the indictment, but that is wrong. *United States v. Herrera*, 366 Fed. App'x 674, 676-77 (7th Cir. 2010). The evidence is key in linking the defendant to the conspiracy charged in the other counts, and is made especially important by the long delay (attributable to difficulty in locating the defendant and bringing him back to the United States for trial) between the crimes with which he is charged, which occurred between 1996 and 1999, and the trial in 2010. The fingerprint evidence, unlike the memories of witnesses, had not deteriorated with the passage of time.

The trial, as we said, began on July 6. Before then, in March, on the government's appeal from an order excluding evidence before trial we had reversed the district judge's decision to exclude evidence that two of the defendant's fingerprints had been recovered from a bag of heroin wrapped in tape and further encased in condoms and found in a drug courier's

rectum. *United States v. Herrera, supra.* The heroin had been removed from the bag and placed in an evidence bag (Roberson Seizure 1) and then both it and the packaging (the tape and condoms) had been placed in another evidence bag (Roberson Seizure 2), and it was this second exhibit that was at issue. The district judge's ground for excluding it was the government's having violated a discovery deadline, and we ruled that there was no indication of bad faith by the government and that the exclusion of highly probative fingerprint evidence was a disproportionate sanction for an innocent violation that had not prejudiced the defendant.

A week into trial the district judge again ordered the evidence excluded, this time because of his concern that the government hadn't adequately demonstrated the requisite "chain of custody"—that there had been no opportunity to tamper or otherwise mishandle the evidence between when it was obtained and the trial. Yet a challenge to chain of custody ordinarily goes to the weight rather than the admissibility of the evidence. E.g., *United States v. Turner*,, 591 F.3d 928, 934-35 (7th Cir. 2010); *United States v. Lee*, 502 F.3d 691, 697-98 (7th Cir. 2007). And already by the end of the first week of trial the government had offered nine witnesses—and it added a tenth before filing its second mandamus petition—to establish that the chain had been intact and thus assuage the judge's concerns.

The judge stayed the trial to enable the government to petition for mandamus. We granted a brief further stay while we considered the petition, but upon being unexpectedly advised by the judge that he hadn't yet made a final decision on whether to exclude the evidence (though when he sustained the defendant's

objection to the evidence he had given no indication that his ruling was tentative), we denied the petition without prejudice.

Trial resumed on July 19, and three days later the judge definitively excluded the fingerprint evidence on suspicion of tampering. He was disturbed by the fact that the exhibit had gained 20 grams in weight between May and September 2001. (Oddly, he attached no significance to the fact that it had gained 190 grams between September 2001 and the trial.) He thought the weight gain might have been due to federal officers pressing a piece of adhesive tape containing the defendant's fingerprints (obtained elsewhere) onto the packaging of the heroin found in the drug courier's rectum. Again he stayed the trial to enable the government to renew its quest for mandamus, and it is the government's renewed petition that we granted on July 27.

The transcript of the district judge's remarks concerning the evidentiary issue reveals a degree of anger and hostility toward the government that is in excess of any provocation that we can find in the record. He repeatedly accused the government lawyers of lying. He said, for example: "I don't believe you when you say just about anything anymore because I know that you will lie to a court any time it helps you. I know that. I saw you do it. I know you will do that. You have proven that to me beyond a reasonable doubt." He said: "I am going to bring the jury out, and I am going to tell them the government has failed, once again, to have witnesses ready to proceed. The government is delaying this case. Members of the jury, this case is being delayed

by the government. It has been delayed by the government. Your time has been wasted by the government." He said: "I would like you [the government lawyers] to go back to the Court of Appeals and tell them, gee, we would like to mandamus Judge Holderman because he won't allow us to call more witnesses or prove our chain of custody that we asked you, the Court of Appeals, last week to order him to present in the evidence in the case, to admit the document, to admit the exhibit into evidence. We now want to call more witnesses to lay the foundation, witnesses that Judge Holderman has pointed out we need. We now agree with Judge Holderman, and we were wrong last week when we tried to mandamus him. I would like you to go to the Court of Appeals and you tell them that. Will you do that?... Will you do that? Will you go to the Court of Appeals and admit that you lied to them...." He threatened to conduct hearings concerning misconduct by the prosecutors (shades of the conduct that led to the issuance of the writ of mandamus in *In re United States, supra*).

The government had explained to the judge that the reason for the increase in weight was that the bag with the fingerprints, after being opened so that the presence and amount of an illegal drug could be determined, and later closed up again, had been weighed together with other bags. The reported weight was the weight of the package containing the several bags, and there were more bags in it when it was weighed later. Obviously the package did not gain 210 grams (330 + 20 + 190 = 540)—almost half a pound—because a piece of the tape in which one of the bags was wrapped was replaced by a strip of tape

containing the defendant's fingerprints. The judge acknowledged that his supposition of tampering was "speculative," which is an understatement. For among other things the defendant was not extradited from Panama until long after the alleged tampering, and until he was extradited the government did not have a set of fingerprints known to be his; and in addition no one has explained how fingerprints on another piece of material could have been transferred to the adhesive side of the tape, which was where they were found.

Any such tampering would be a criminal obstruction of justice. A judge should not accuse anyone of a crime on the basis of an implausible speculation. We note that the defendant's petition and amended petition for rehearing do not defend the judge's theory.

The defendant will be able at trial to argue that the jury should disregard the evidence, but there is no justification for excluding it on the "speculative" ground excogitated by the judge. *United States v. Prieto,* 549 F.3d 513, 524-25 (7th Cir. 2008); *United States v. Kelly,* 14 F.3d 1169, 1175 (7th Cir. 1994); *United States v. Harrington,* 923 F.2d 1371, 1374 (9th Cir. 1991) ("merely raising the possibility of tampering is not sufficient to render evidence inadmissible"). So clear is this, and so manifest the excess of emotion demonstrated by the judge in excluding the evidence, that we can only conclude that the exacting standard for the grant of a writ of mandamus, *Cheney v. United States District Court,* 542 U.S. 367, 380 (2004); *In re Rhone-Poulenc Rorer, Inc., supra,* 51 F.3d at 1294-95 (7th Cir. 1995)

("irreparable injury is not sufficient for mandamus; there must also be an abuse of discretion that can fairly be characterized as gross, very clear, or unusually serious"); *United States v. Spilotro,* 884 F.2d 1003, 1006-07 (7th Cir. 1989), has been satisfied.

A word finally about our decision to order the case reassigned to another judge. As explained in *In re United States,* 572 F.3d 301, 308 (7th Cir. 2009) (a different case from the *In re United States* cited earlier), the recusal of a judge is required "when a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." See 28 U.S.C. § 455(a); *Reserve Mining Co. v. Lord,* 529 F.2d 181, 188-89 (8th Cir. 1976) (en banc). When the government filed its initial interlocutory appeal, the district judge without adequate grounds accused the government of appealing for the sole purpose of delaying the trial, and implied, again without basis in the record, that the government had acted in bad faith by not complying with the judge's discovery order. After the trial began, he told the jury that the government was responsible for the numerous delays in the case and he threatened to tell the jury that it "should consider the case based upon everything that has happened in the courtroom, presented in the court-room, including the delays that have taken place." No reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his unreasonable fury toward the prosecutors.

We are satisfied that our order of July 27, as supplemented on July 28, was sound; and we deny the petition for rehearing.

Appendix B

United States Court of Appeals,
Seventh Circuit

UNITED STATES of America, Plaintiff-Appellant,
v.
Clacy Watson HERRERA, Defendant-Appellee.
No. 09-3717.

Argued Feb. 25, 2010.
Decided March 3, 2010.

Tyler Murray, Attorney, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellant.

Gabriel A. Fuentes, Attorney, Jenner & Block LLP, Chicago, IL, for Defendant-Appellee.

Before RICHARD D. CUDAHY, Circuit Judge, TERENCE T. EVANS, Circuit Judge, DIANE S. SYKES, Circuit Judge.

ORDER

One week before Clacy Watson Herrera's trial was scheduled to begin, the government announced that it intended to introduce fingerprint evidence. The district court, finding the disclosure to be a violation of its discovery deadline, entered an order excluding the evidence. The government brings this interlocutory appeal, under 18 U.S.C. § 3731, challenging the decision to exclude its fingerprint evidence.

Herrera was charged in 2001 as the lead defendant in a 44-count indictment that alleges a three-year international drug trafficking conspiracy involving over 40 individuals. From 1996 to 1999, the conspirators, allegedly, imported large amounts of cocaine and heroin into the United States from Jamaica and Panama. Herrera, operating in Panama, was alleged to be the conspiracy's primary supplier. The conspirators recruited female couriers in the United States, primarily in Chicago, to travel to Panama to receive drugs from Herrera. Various methods were used to smuggle the drugs into the United States. On some occasions, the organizers put the drugs in plastic wrap packaging, which the couriers swallowed or inserted into their body cavities. The most popular method, however, involved hiding the drugs inside baby formula cans. To avoid questions at airport security, the conspirators paid parents in the United States to loan their infants to the smugglers. The couriers traveled with the rented infants and baby formula cans to Panama where the cans were filled with liquid cocaine for the return trip.

Not only is this case complex given the size of the operation, but it is also unusual. The indictment named 26 defendants, 22 of whom were convicted in 2002 and one was convicted in 2004. Meanwhile, Herrera remained a fugitive from 2001 until June 2009 when he was extradited from Panama, where he had been in custody on an unrelated narcotics conviction.[FN1] Herrera was arraigned in federal court in Chicago on June 25, 2009. At a status hearing a few weeks later, on July 16, a November 9, 2009, trial date was set.

> FN1. Apparently Herrera either escaped or was released from custody in Panama sometime in 2007. Subsequently, the government says, he was located in Colombia and returned to Panama.

Due to the passage of time between the indictment and trial, witnesses have been hard to come by, let alone ones who remember events that occurred over a decade ago. Accordingly, on August 14, 2009, the district court certified this matter as a complex case under the Speedy Trial Act and entered an order requiring disclosure of expert testimony by September 21.

In early September, federal agents began gathering evidence from the old investigation (such as drugs and drug packaging) that they believed was connected to Herrera. The government advised him that it was submitting the evidence for fingerprint analysis. Then on September 21, the government notified Herrera that it might call a fingerprint expert, but, at that time, it had not received any results from the fingerprint testing. On November 2, a week before trial, the government was informed that two fingerprints matching Herrera's had been found on drug packaging. The government disclosed the results to Herrera along with a preliminary expert report. On November 3, Herrera asked the district court to exclude the fingerprint evidence due to the government's tardiness. The court granted the motion.

As an initial matter, the government argues that it

did not violate the district court's discovery order because the September 21 deadline did not apply to fingerprint testing. We review a district court's discovery rulings for an abuse of discretion. United States v. Stevens, 380 F.3d 1021, 1025 (7th Cir.2004). The government notes that, at a hearing on September 29, Herrera acknowledged the government's ongoing fingerprint testing and said he may need to obtain his own expert opinion. Therefore, the government argues there was no understanding that the September 21 deadline applied to fingerprint evidence. However, the government fails to cite any case law to support its claim. The district court is entitled to great deference in construing its discovery order, and thus it was not an abuse of discretion to find the government in violation of it.

[2] The district court went too far, however, in its choice of remedy. The punishment simply does not fit the crime. We review a district court's ruling on the admission or exclusion of evidence for an abuse of discretion. *United States v. Jumper*, 497 F.3d 699, 703 (7th Cir.2007). When considering a motion to exclude evidence, a district court should take into account whether the government acted in bad faith and whether any unfair prejudice to the defendant can be cured by a less severe alternative. See *United States v. De La Rosa*, 196 F.3d 712, 717 (7th Cir.1999). There is no showing here of either bad faith or reckless foot-dragging by the government. Because the evidence is scientific, it has immense probative value. This is a complex case where a great deal of time has passed, so witnesses' memories may be poor, making the scientific evidence all the more

crucial. Exclusion of the government's fingerprint evidence was too drastic a remedy. A more appropriate remedy might have been moving the trial ahead a few weeks to give the defense a greater opportunity to study and confront the evidence. Of course, that would have worked an imposition on the court's calendar, but such is life. We think the district court's order was an abuse of discretion.

We REVERSE and REMAND for further proceedings.

C.A.7 (Ill.),2010.
U.S. v. Herrera
366 Fed. Appx. 674, 2010 WL 730150 (C.A.7 (Ill.), 2010)

Appendix C

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 15, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

The following are before the court:

1. GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS, filed on July 14, 2010, by counsel for the petitioner.

2. REQUEST BY RESPONDENT, JAMES F. HOLDERMAN, FOR AN OPPORTUNITY TO RESPOND TO THE GOVERNMENT'S PETITION, filed on July 15, 2010, by the respondent.

On July 14, 2010, the court granted the GOVERNMENT'S EMERGENCY PETITION FOR STAY OF TRIAL PROCEEDINGS, filed on July 14, 2010, by counsel for the government and ordered the district court to stay trial pending resolution of #1.

The government's petition seeks the remedy of mandamus against evidentiary rulings made by the

respondent excluding certain physical evidence that was the subject of an earlier appeal in this case, *see United States v. Herrera*, No. 09-3717 (7th Cir. Mar. 3, 2010), and related rulings excluding expert-witness testimony regarding that physical evidence. The exclusion of this evidence appears to be premised on chain-of-custody grounds. *But see United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007) (government is "not required to prove a perfect chain of custody," and any gaps in the chain go to the weight of the evidence and not its admissibility); *United States v. Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994) ("When there is no evidence of tampering, a presumption of regularity attends the official acts of public officials in custody of evidence."); *id.* (The government need not exclude all possibilities of tampering; "all the government must show is that reasonable precautions were taken to preserve the original condition of evidence.").

Respondent avers in #2 that he "has made no definitive ruling on the record admitting or excluding [the] evidence at issue." The court construes this as a statement that the respondent also has not definitively ruled on whether the government may recall Stephen Koop, its expert forensic chemist. In light of respondent's averment, IT IS ORDERED that the stay is VACATED.

IT IS FURTHER ORDERED that #1 is DENIED without prejudice to renewal after definitive rulings are made.

IT IS FINALLY ORDERED that #2 is DENIED as moot.

Appendix D

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 27, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

IT IS ORDERED that the GOVERNMENT'S RENEWED PETITION FOR A WRIT OF MANDAMUS, filed on July 26, 2010, by counsel for the petitioner is GRANTED.

The district court shall admit G. Ex. Roberson Seizure 2, allow the government to recall Stephen Koop to testify regarding the recovery of latent fingerprints from that exhibit, and also allow testimony regarding comparison of the latent prints with known fingerprints of the defendant.

Circuit Rule 36 shall apply on remand. The case shall be reassigned to a district judge who is immediately available to preside, and the trial shall resume as soon as possible.

An explanatory opinion will follow.

Appendix E

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

July 28, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

Rule 25(a)(2) of the criminal rules provides that in cases in which the original trial judge is disabled, the judge who replaces him must certify his familiarity with the trial record before proceeding. Although the rule speaks only of "death, sickness, or other disability," and does not mention other reasons why a judge might cease to preside over a case during trial, it defines a practice that should be followed whatever the reason. Therefore we direct that the new judge before proceeding with the trial certify his familiarity with the trial record.

Appendix F

United States Court of Appeals,
Seventh Circuit

In Re United States.
Case No. 10-2678.

August 20, 2010

Before POSNER, ROVNER, and SYKES, Circuit Judges.

ORDER

On July 27, 2010, petitioner filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

Appendix G

United States District Court
Northern District of Illinois
Eastern Division

UNITED STATES of America, Plaintiff
v.
Clacy Watson HERRERA, Defendant.
No. 01 CR 1098-1.

July 22, 2010

VOLUME 11
EXCERPT OF TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES F.
HOLDERMAN

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THE COURT: "The government need not exclude all possibilities of tampering with evidence in order to establish a sufficient chain of custody. What the government needs to show is only that it took reasonable precautions to preserve the original condition of the evidence. If the trial judge is satisfied in a reasonable probability that the evidence has not been altered in any material respect, he may permit its introduction."

I have excluded from my consideration possibilities of tampering due to failures on the part of the government agents to properly document the chain of custody in this case. I have given credit to every government witness who has testified about which that witness has testified.

It was clear to me from reviewing Government Exhibit Roberson Seizure Chain of Custody Document, as an experienced trial judge, a former Assistant United States Attorney, a former counsel in private practice, many, many years of litigation experience, that there were some problems with the handling of Government Exhibit Roberson Seizure 2, problems that presented possibilities of tampering.

The government answered some. As I said, I have given credit to every government witness and the testimony they have provided.

The government did not elicit testimony from Lynnette Prado why the weight increased by more than 20 grams with regard to the illegal, allegedly

illegal heroin, and that is a part of Government Exhibit Roberson Seizure 2.

The government had the same document I had. The government could have examined it and maybe did examine it. That was a question that needed to be answered. That was a question the government did not answer, will not answer. And so the document itself evidences a change, a material change in the condition of the exhibit. An increase of the weight, whether it's packaging or drugs -- we don't know. But we know that the weight then continued to remain constant in that same condition after it was altered from 330 grams to 350 grams in September of 2001. We know that from the document, Government Exhibit Roberson Seizure Chain of Custody Document. The government counsel knew that, too.

I have looked at this carefully as a seasoned trial judge would. I have done what I can to give the government every chance -- more chances than the defense thinks I should have given them -- to address this question of material change in the exhibit and the condition of the exhibit. The government did not show me the reasonable precautions that it took with regard to the rebagging. No evidence was presented about that exhibit on that point, Government Exhibit Roberson Seizure 2.

I tried very hard to satisfy myself as the trial judge that there is a reasonable probability that the evidence has not been altered in any material respect, but as I look at the document itself in the absence of any further evidence, I cannot say there is a reasonable probability that the evidence has not

been altered when, in fact, the document shows the evidence has been altered.

The defense objection to Government Exhibit Roberson Seizure 2 is sustained.

Pages 1807-09.

Appendix H

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Appendix I

United States Code Annotated

Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 235. Appeal
§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or

denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

Appendix J

United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts
VI. Trial
Rule 25. Judge's Disability

(a) During Trial. Any judge regularly sitting in or assigned to the court may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict of Finding of Guilty.

(1) **In General.** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(2) **Granting a New Trial.** The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.